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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1377

RUSSELL E. TRAIN
Administrator, United States
Enviornmental Protection Agency
vs. *Petitioner,*

THE CITY OF NEW YORK
on behalf of itself and all other
similarly situated municipalities
within the State of New York, et al.
Respondents.

No. 73-1378

RUSSELL E. TRAIN
Administrator, United States
Enviornmental Protection Agency
vs. *Petitioner,*

CAMPAIGN CLEAN WATER, INC. *Respondent.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA AND THE FOURTH CIRCUIT

BRIEF FOR STATE OF OHIO AS AMICUS CURIAE SEEKING AFFIRMANCE

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BRIEF FOR STATE OF OHIO AS AMICUS CURIAE SEEKING AFFIRMANCE

QUESTIONS PRESENTED

I. Whether Congress granted the Administrator of the United States Environmental Protection Agency discretion to control the rate of spending under the grant program of Title II of the Federal Water Pollution Control Act Amendments of 1972 by making allotments to states of less than the full amounts authorized.

II. Whether the doctrine of soverign immunity bars an action against the Administrator to compel the allotment of funds authorized by Congress in the Federal Water Pollution Control Act Amendment of 1972.

STATEMENT OF CASE

Amicus adopts the Statement of the Case as presented by Respondents.

INTEREST OF AMICUS

The failure of the Administrator of the United States Environmental Protection Agency to allot the full sums authorized by Congress in the Federal Water Pollution Control Act Amendments of 1972 ("the act") for state and local government construction of sewage treatment plants, has seriously jeopardized Ohio's efforts to improve the quality of its water.

The Administrator's unlawful actions caused Ohio to be alloted $346,422,000 less for fiscal years 1973 and 1974, and $150,909,300 less for fiscal year 1975, than would have been allotted had the Administrator allotted the entire amount required.

Because of the decrease in funding available for public waste water treatment projects in Ohio, many municipal and regional waste water treatment programs will be unable to achieve

the goal of the Act set forth in 33 U. S. C. Section 1311 [Section 301] that all publicly owned treatment plants employ secondary treatment or meet water quality standards by 1977.

Furthermore, as a result of the Administrator's unlawful actions, only 97 projects will receive federal assistance. Some 246 fully planned construction projects in Ohio would have been eligible for funding had full allotment been made. The remaining 149 municipalities will be unable to construct waste water treatment plants that are badly needed by the citizens of Ohio.

ARGUMENTS

Introduction

Amicus, State of Ohio, urges the Court to affirm the decisions of the District Courts and the Courts of Appeals in the cases of *City of New York v. Train* and *Campaign Clean Water, Inc. v. Train.*

Amicus interprets Sections 205(a) and 207 of the Act as granting no discretion whatsoever to the Administrator to allot less than all the funds authorized by Congress for construction of municipal waste water treatment facilities. The Act and its legislative history clearly support this position.

Amicus also contends that sovereign immunity does not bar an action to require the Administrator to comply with the Act's mandate and allot the full sums authorized to the states. It is well established that an exception to the doctrine of sovereign immunity is the failure of a public officer to perform an act in which he has no discretion.

I

The Congress has not granted the Administrator of the United States Environmental Protection Agency discretion to control the rate of spending under the Grant Program of Title II of the Federal Water Pollution Control Act Amendments of 1972 by making allotments to states under 33 U. S. C. 1285(a) [Section 205(a)] of less than full amounts authorized by 33 U. S. C. 1287 [Section 207].

A. Section 205 (a) requires the administrator to allot all the amounts authorized by Section 207.

The Administrator was granted no discretion whatsoever by Congress to withhold funds at the allotment stage that were authorized to be appropriated by 33 U. S. C. Section 1287 [Section 207] and required to be alloted by 33 U. S. C. Section 1285(a) [Section 205(a)]. It is the interpretation of these two sections which forms the principal issue of this case. 33 U. S. C. Section 1285 [Section 205] and Section 1287 [Section 207] provide:

> Sec. 205. (a) Sums authorized to be appropriated pursuant to Section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than January 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. Such sums shall be allotted among the States by the Administrator in accordance with regulations promulgated by him, in the ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears to the estimated cost of construction of all needed publicly owned treatment works in all of the States. For the fiscal years ending June 30, 1973, and June 30, 1974, such ratio shall be determined on the basis of Table III of House Public Works Committee Print No. 92-50. Allotments for fiscal years which begin after the fiscal year ending June 30, 1974 shall be made only in accordance with a revised cost estimate and submitted to Congress in accordance with Section 516(b) of this Act and only after such revised cost estimate shall have been approved by law specifically enacted hereafter.
>
> (b)(1) Any sums allotted to a State under subsection (a) shall be available for obligation under Section 203 on and after the date of such allotment. Such sums shall continue available for obligation in such State for a period of one year after the close of the fiscal year for which such sums are authorized. Any amounts so allotted which are not obligated by the end of such one-year period shall be

immediately reallotted by the Administrator, in accordance with regulations promulgated by him, generally on the basis of the ratio used in making the last allotment of sums under this section. Such reallotted sums shall be added to the last allotments made to the States. Any sum made available to a State by reallotment under this subsection shall be in addition to any funds otherwise allotted to such State for grants under this title during any fiscal year.

(2) Any sums which have been obligated under Section 203 and which are released by the payment of the final voucher for the project shall be immediately credited to the State to which such sums were last allotted. Such released sums shall be added to the amounts last allotted to such State and shall be immediately available for obligation in the same manner and to the same extent as such last allotment.

Sec. 207. There is authorized to be appropriated to carry out this title, other than Sections 208 and 209, for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000, and for the fiscal year ending June 30, 1976, not to exceed $7,000,000,000.

The language upon which amicus bases its arguments is that of 33 U. S. C. Section 1285(a) [Section 205(a)], which mandated that "[s]ums authorized to be appropriated pursuant to Section 207. . *shall* be allotted by the Administrator. . ."(Emphasis added.) Thus, the act of allotment is devoid of discretion on the part of the Administrator. He must allot all "sums authorized to be appropriated."

33 U. S. C. Section 1287 [Section 207] sets forth the "sums authorized to be appropriated:" "There is authorized to be appropriated to carry out this title. . .not to exceed [$11 billion for fiscal years 1973 and 1974]." While conceding that the act of allotment is mandatory, the Administrator asserts that the inclusion of the words "not to exceed" in 33 U. S. C. Section 1287 [Section 207] empowers him to allot to the states less than the total authorized amount. Amicus asserts, however, that the words "not to exceed" grants discretion to withhold funds, if at all, only at the obligation stage of expenditure of funds. Thus, as other provisions of the Act and pertinent legislative history discussed below clearly demonstrate,

the intent of Congress was to provide for allotment of the entire amount of authorized funds. Thereafter, amounts "not to exceed" the authorized maximum will be obligated and expended upon eligible projects presented to the Administrator for funding.

Congress evidenced its commitment to the construction of municipal wastewater treatment facilities in passing the Federal Water Pollution Control Act Amendments of 1972. This commitment was manifested in the language and scheme of the Act in three ways:

First, in 33 U. S. C. Section 1251 [Section 101], Congress unequivocally establishes that, *"it is the national policy that the Federal financial assistance be provided to construct publically owned waste treatment works."* (Emphasis added.)

Secondly, in Title II of the Act, entitled "Grants for Construction of Treatment Works" it is stated that "[i]t is the purpose of [Title II] *to require and to assist* the development and implementation of waste treatment management plans and practices which will achieve the goals" of providing swimmable and habitable waters by mid-1983 and of completely eliminating the discharge of pollutants by 1985. (Emphasis added.) To this end, the Administrator is authorized to make grants for the construction of publicly-owned waste treatment works in the amount of 75 percent of the total construction cost.

Thirdly, Title III of the Act establishes firm deadlines by which certain levels of sewage treatment are to be achieved. These deadlines and levels are legally enforcable in a number of ways, and specific sanctions are prescribed for their violation. 33 U. S. C. Section 1311 [Section 301(a)] provides in part that "[e]cept as in compliance with this section * * * the discharge of any pollutant by any person shall be unlawful." The Administrator must enforce Section 301 violations, pursuant to 33 U. S. C. Section 1319 [Section 309]. A private litigant can also enforce Section 301 violations under 33 U. S. C. Section 1365 [Section 505].

Thus, it is clear that the language and statutory scheme of the Act require the Administrator to allot to the states all the amounts authorized by 33 U. S. C. Section 1287 [Section 207]. To conclude otherwise places the proprietors of public wastewater treatment facilities upon the horns of a dilemma: either to attempt to bear the impossible burden of financing all of the required construction, or to incur civil and criminal liability.

B. The legislative history of the Water Pollution Control Act Amendments of 1972 demonstrates that Congress did not intend to grant the Administrator authority to allot less than the full amounts authorized.

The legislative history of the Act also supports the interpretation of 33 U. S. C. Section 1285(a) [Section 205(a)] as mandating allotment of all funds authorized by 33 U. S. C. Section 1287 [Section 207]. Statements made by Senator Muskie and Congressman Harsha, members of the conference committee which drafted the final version of the Act, are particularly instructive.

In submitting the conference committee report on S. 2770, Senator Edmund Muskie, the bill's principal sponsor and the manager of the Senate conferees, discussed the high level of authorized funding as follows:

> * * * * [T]hose who say that raising the amounts of money called for in this legislation may require higher taxes, or that spending this much money may contribute to inflation simply do not understand the language of this [water pollution] crisis.
>
> The conferees spent hours and days studying the problem of financing the cleanup effort required by this new legislation. The members agreed in the end that a total of $18 billion had to be committed by the Federal Government in 75 percent grants to municipalities during fiscal years 1973-75. That is a great deal of money; but that is how much it will cost to begin to achieve the requirements set forth in the legislation. * * * *
>
> * * * * *[T]he conferees are convinced that the level of investment that is authorized is the minimum dose of medicine that will solve problems we face.* 118 Cong. Rec. S16870-71 (Daily ed. Oct 4, 1972). (Emphasis added.)

After pointing up the urgency of the needs that had prompted the conference committee to authorize appropriations of large sums of money for waste treatment plant construction, Senator Muskie touched briefly on two changes in wording that had been made by the conferees to grant the executive branch a limited measure of discretion in controlling the rate of spending under the Act.

> * * * * [T]he conferees attempted also to reduce the possibility that this legislation would be vetoed. In our last conference, the able and distinguished ranking minority member of the House Committee on Public Works offered two amendments which he indicated would reduce opposition to the bill from the White House and the Office of Management and Budget. These two amendments were accepted by your [Senate] conferees * * * in order to remove the question of veto on the basis of the money authorized by the legislation.
>
> Under the amendments proposed by Congressman William Harsha and others, the authorizations for obligational authority are "not to exceed" $18 billion over the next three years. Also, "all" sums authorized to be obligated need not be committed, *though they must be allocated.* These two provisions were suggested to give the administration some flexibility concerning the *obligation* of construction grant funds.
>
> The conferees do not expect these provisions to be used as an excuse in not making the commitments necessary to achieve the goals set forth in the act. At the same time, there may be instances in which the obligation of funds to a particular project in a particular State may be contrary to other public policies such as the National Environmental Policy Act. In these cases the conferees would, of course, expect the administration to refuse to enter into contracts for construction. [Id. at S. 16871.] (Emphasis added.)

There was no further mention of these two conference committee amendments on the floor of the Senate; after discussing other aspects of the bill, the Senate voted unanimously (74-0) in favor of the bill's enactment. Thus, Senator Muskie ascribed to the Administrator some discretion to withhold funds, *but only at the obligation stage,* i.e., the actual expenditure of funds for a specific project, and not at the allotment stage.

Statements by Congressman Harsha indicate his agreement with Senator Muskie that any discretion on the part of the Administrator is limited to the obligation stage. Turning to the two amendments mentioned by Senator Muskie in the Senate discussion, Congressman Harsha stated:

> * * * I want to point out that the elimination of the word "all" before the word "sums" in Section 205(a) and insertion of the phrase "not to exceed" in Section 207 was intended by the managers of the bill to emphasize the President's flexibility to control the rate of spending.
>
> * * * *
>
> Second, I would like to point out that the Administrator of the Environmental Protection Agency must approve plans, specifications and estimates. *This is the pacing item in the expenditures of funds.* It is clearly the understanding of the managers that under these circumstances the Executive can control the rate of expenditures. [Id. at H. 9122.] (Emphasis added.)

C. The authority to control the rate of spending may not be exercised by allotting less than the amounts authorized to be appropriated.

In sum, the Administrator's claim that he holds authority to allot less than the full amounts authorized for allotment by 33 U. S. C. Section 1287 [Section 207] has no basis in the language of 33 U. S. C. Section 1285(a) [Section 205(a)] and Section 1287 [Section 207], other provisions of the Act, nor in pertinent legislative history.

Of the numerous cases decided by the lower federal courts only one case has been decided in which a court favored an interpretation of the Federal Water Pollution Control Act Amendments of 1972 granting the Administrator discretion to withhold funds at the allotment stage, *Brown v. Ruckelshaus,* 364 F. Supp. 258 (C. D. Cal., 1973). It should be noted that in *Brown,* the District Court reached the merits of the question presented to the Court by this case only after holding that the action should be dismissed due to a lack of standing on the part of the plaintiff. Clearly, this *obiter dicta* represents an erroneous conclusion, which flies in the face of the clear meaning of the Act and its legislative history. In *Campaign Clean Water v. Ruckelshaus,* 361 F. Supp. 689 (E. D. Va., 1973), plaintiff prevailed, but asserted not that the Administrator had no discretion at the allotment stage, but rather that he had abused his limited discretion.

In the other seven cases decided on the merits by the District Courts it was held that the correct interpretation of the Federal Water Pollution Control Act Amendment of 1972 grants the Administrator no discretion to withhold funds and requires allotment of the full sums authorized by 33 U. S. C. Section 1287 [Section 207]. *City of New York v. Ruckelshaus,* 358 F. Supp. 669 (D. D. C., 1973); *State of Minnesota v. Fri,* D. Minn., No. 4-73, Civ. 133, June 25, 1973; *Martin - Trigona v. Ruckelshaus,* N. D. Ill., 72-C-3044, June 29, 1973; *State of Texas v. Ruckelshaus,* W. D. Tex., C. A. No. A-73-CA-38, October 2, 1973; *State of Florida v. Train,* N. D. Fla., Civ. No. 73-156, February 25, 1974; *State of Maine v. Train,* D. Maine, Civ. No. 14-51, June 21, 1974; *State of Ohio v. Administrator, United States Environmental Protection Agency,* N. D. Ohio, Nos. C73-1061 and C74-104, June 16, 1974.

Thus, it is clear from the Act and its legislative history that the Administrator lacks discretion to control the rate of spending at the allotment stage by alloting to the states less than the full amounts authorized by Congress.

II

The Doctrine of Sovereign Immunity does not bar an action to compel allotment of funds authorized by Congress in the Federal Water Pollution Control Act Amendments of 1972.

Sovereign immunity is not an absolute bar to a suit against an officer of the sovereign where there has been no consent to be sued. The doctrine of sovereign immunity is generally applicable, with exceptions, to suits "against the sovereign if 'the judgment would expend itself on the public treasury or domain, or interfere with the public administration,' * * * or if the effect on the judgment would be 'to restrain the Government from acting, or to compel it to act,'" *Dugan v. Rank,* 372 U.S. 609, 620 (1963). In its inquiry into the defense of sovereign immunity raised by the United States in a suit against reclamation officials over water rights in Oregon, the Court set forth explicit exceptions to the doctrine:

> Nor do we believe that the action of the Reclamation Bureau officials falls within either of the *recognized exceptions to the above general rule* as reaffirmed only last term * * * * Those exceptions are (1) *action by officers beyond their statutory powers* and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void * * * * *In either of such cases the officer's action "can be made the basis of a suit for specific relief against the officer as an individual* * * * * "
>
> *Dugan v. Rank, supra,* 372 U.S. at 621-22 (Emphasis added).

See also, *Marlowe v. Bowdoin*, 369 U.S. 643, 647 (1962); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-91 (1949).

As the Administrator has acted beyond his statutory powers in refusing to allot among the states the funds authorized by Congress in Section 207 of the Act, the case at bar is clearly included in the first exception recognized by the Court in *Dugan.* See also, *State Highway Commission of Missouri v. Volpe,* 479 F. 2d 1099 (8th Cir., 1973).

Also notable in this context is the case of *Littell v. Morton*, 445 F. 2d 1207 (4th Cir., 1971). The Court in *Littell* held that an action may be brought against the United States for compensatory damages - even when the two traditional exceptions set forth in *Dugan v. Rank* do not apply - if the following conditions are satisfied: (1) the Administrative Procedure Act authorizes judicial review, and (2) facts of the case are not such that dismissal is required to satisfy the underlying policies of the doctrine of sovereign immunity. The case at bar falls within the requirements of *Littell* in the following respects: The requirements of review under the Administrative Procedure Act are satisfied in that respondents are "persons ***adversely aggrieved by agency action," 5 U. S. C. Section 704; the action of the Administrator is a "final action for which there is no other adequate remedy in a court," 5 U. S. C. Section 704; allotment is not "committed to agency discretion by law," 5 U. S. C. Section 701(a)(2); and the action of the Administrator was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U. S. C. 706(2)(A). Furthermore, the

doctrine of sovereign immunity does not compel dismissal, for this action does not cause a substantial interference with the regulatory program of the Administrator, but, rather, seeks that the program be administered in accordance with law. In sum, the tests of both *Dugan* and *Littell* are satisfied by the case at bar.

Petitioner appears to argue that the doctrine of sovereign immunity automatically comes into play, regardless of the nature of the action, whenever the ultimate result of any judgment will be the expenditure of public funds. That contention cannot be squared either with the Supreme Court's language in *Dugan* or with the doctrine that the provisions of the Administrative Procedure Act serve as an exception to the immunity doctrine. Indeed, to support its contention the petitioner places great reliance upon the Court's holding in *Hawaii v. Gordon,* 373 U.S. 57 (1963). That case, it should be noted, is a per curiam decision accompanied by an opinion less than a page in length, and was decided only two weeks after *Dugan*. It merely represents, therefore, an application of the sovereign immunity doctrine and exceptions thereto.

Furthermore, it should be noted that the immediate expenditure of public funds is not involved in this action, thus further weakening petitioner's argument. Respondents seek relief whereby funds will be *allotted* for expenditure should a project be approved for funding by the Administrator. Thus, although allotment is a prerequisite to expenditure, actual disbursement of funds is not mandated by the fact of allotment.

Several federal district courts have been presented this issue in cases virtually identical to the instant case. Each has held that the first exception provided by *Dugan* is directly applicable, i.e., that in an action in which a government official is alleged to have exceeded his statutory authority, immunity does not lie, even if the expenditure of public funds may result. *Cf. State of Minnesota v. Fri*, D. Minn. No. 4-73, Cir., 133, June 25, 1973; *State of Texas v. Ruckelshaus*, W. D. Tex., C. A. No. A-73-CA-38, October 2, 1973.

In short, the theory of sovereign immunity is not applicable to this case, for the Administrator's actions fall within an established exception to the doctrine. Furthermore, the relief afforded by the courts below does not require the obligation or expenditure of appropriated monies; rather, the Administrator has been directed to perform a non-discretionary duty.

CONCLUSION

The judgments of the Courts of Appeals in both cases should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 1974, a copy of the State of Ohio's Amicus Brief seeking affirmance was served to all counsel of record in the main proceeding. I further certify that all parties required to be served have been served.

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